No. 80-83

IN THE

Supreme Court of the United

OCTOBER TERM, 1980

EDMUND S. MUSKIE,
SECRETARY OF STATE,

Petitioner,

—v.—

PHILIP AGEE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... i

QUESTIONS PRESENTED..... 2

STATEMENT OF THE CASE..... 2

REASONS FOR DENYING
THE PETITION.....14

CONCLUSION.....29

TABLE OF AUTHORITIES

Cases	Page
Aptheker v. Secretary of State, 378 U.S. 500 (1964)	5,11,15,27
Darr v. Burford, 339 U.S. 200 (1949)	.15
Dayton v. Dulles, 357 U.S. 144 (1958)	.15,20
Goss v. Lopez, 419 U.S. 565 (1975)	.27
Kent v. Dulles, 357 U.S. 166 (1958)	.passim
Mackey v. Montrym, 443 U.S. 1 (1979)	.27
Mathews v. Eldridge, 424 U.S. 319 (1976)	.27
Saxbe v. Bustos, 419 U.S. 65 (1974)	.25
SEC v. Chenery Corp. 323 U.S. 194 (1974)	.10
Snepp v. United States, No. 78-1871(Feb. 19, 1980)	.1,16
United States v. Rutherford, 442 U.S. 544 (1979)	.25
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1953)	.15,17,20,29

Cases	Page
Zemel v. Rusk, 381 U.S. 1 (1965)	passim
Constitutional Provisions	
Amendment I	11,27
Amendment V	11
Statutes	
United States Code	
Title 22, Section 1732	10
Title 22, Section 211a	19,23
Other Authorities	
Code of Federal Regulations,	
Title 22,	
Section 51.70(b)(4)	passim
Section 51.71	passim
Congressional Hearings,	
Hearings on Denial of Passports to Persons Knowingly Engaged in Activities Intended to Further the International Communist Movement Before the House Committee on Foreign Affairs, 85th Cong., 2nd Sess. (1958). .	21
Hearings on Passport Legislation Before the Senate Foreign Relations Committee, 85th Cong., 2nd Sess., (1958) .	21

Cases | Page

Hearings on Passport Legislation Before the Senate Committee on Foreign Relations, 86th Cong., 1st Sess., (1959) 21

Hearings on Proposed Travel Controls Before the Senate Subcommittee to Investigate the Administration of the Internal Security Act, 89th Cong., 2nd Sess., (1966) . . . 21

Congressional Records, 56 Cong. Rec. 6066-6067 (1918). 22,25

124 Cong. Rec. 4689-4690 (daily ed. May 31, 1978). . . . 23

Ehrlich, T., Passports, 19 Stan. L. Rev. 129 (1966) . . . 21

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v.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Philip Agee, respectfully requests the Court to deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the District of Columbia.

QUESTIONS PRESENTED

1. Whether 22 C.F.R. §51.70(b)(4) and 51.71, the sole authority under which the Secretary of State purported to revoke respondent's passport, are statutorily authorized.
2. If so, whether the Secretary's revocation of respondent's passport and the application of those regulations in the circumstances of this case violate respondent's rights secured by the First and Fifth Amendments to the Constitution.

STATEMENT OF THE CASE

1. The Statement set forth in the Petition includes a variety of accusations against respondent which are completely irrelevant to the resolution of this case, and serve no purpose other than to attempt to prejudice the Court by making respondent appear to be an enemy of the state. Those accusations are

based on hearsay and innuendo, and in every respect material to the resolution of this case they are untrue. In fact, respondent is an openly severe critic of the Central Intelligence Agency who has always expressed his criticism in ways protected by the First Amendment. Accusations by officials of the Central Intelligence Agency are before the Court - irrelevant though they are - because they were filed by the government in support of its stay applications and included as appendices to the petition, even though they are not properly part of the record on certiorari. Respondent did not undertake to contest all those accusations because counsel believed the decision whether to issue a stay would turn principally on the absence of any likelihood that the government would succeed on appeal, and that in any event the allegations were not probative of any issues germane to the stay applications.

All of this having been said, it is nevertheless crucial at the outset to dispel two accusations in particular which are repeated throughout the petition.

First, as the opinions below by both Judge Robb and Judge Gesell make clear, (see Pet. App. 4a; Pet. App. 94a), respondent never made any "express concession that his international travel activities have caused and probably will continue to cause serious damage to the nation's security or foreign policy." (Pet. 2 n.1; see also Pet. 6).[1/] To the contrary, the "concession" was expressly in the nature of

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1/ Citations to the Petition for Certiorari are given as "Pet. "; to the various appendices to the Petition, as "Pet. App. a"; to the appendix in the Court of Appeals as "Ct. App. ".

a demurrer, to enable the parties to join issue immediately on the legal question whether 22 C.F.R. §§51.70(b)(4) and 51.71 were statutorily authorized. Ct. App. 15-18, 29, 32, 46. The statutory authorization question did not depend in the courts below, and should not depend here, on the nature of respondent's activities; either the regulation is authorized, or it is not. Similarly, as this Court instructed in a right to travel case, the question of statutory overbreadth does not depend on the particular facts regarding a litigant's past or proposed travel. Aptheker v. Secretary of State, 378 U.S. 500, 515-517 (1964). See Ct. App. 46.

Second, there is absolutely no basis on this record, or in fact, to justify revocation of respondent's passport by reference to recent events in Iran or the Middle East. Respondent has never traveled

to that region.[2/] In an uncontradicted affidavit, he has stated that he has never been invited to Iran by its government or the revolutionary council or any of their representatives; that he has no intention of traveling to Iran either before or after the hostages are released; and that if he were invited to Iran, he would not go for any purpose whatever at least for so long as any Americans are held hostage there. Ct. App. 98. The web that petitioner has tried to weave to ensnare respondent in recent Iranian events is spun wholly out of a single unsubstantiated and uncorroborated article in the New York Post on 17 December, 1979, (see Pet. App. 116a),

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2/ The letter informing respondent that his passport had been revoked referred to his travel in "Mexico, the United Kingdom, Denmark, Jamaica, Cuba, and Germany". Pet. App. 120a.

an article which respondent has repeatedly informed the government had no basis in fact. E.g., Ct. App. 98.

2. The only facts relevant to the disposition of this lawsuit are that respondent is a journalist and author specializing in matters of international politics. He is an internationally known opponent of the clandestine activities conducted abroad by the Central Intelligence Agency. He resides in Hamburg, West Germany, with his wife, an American citizen, and his fifteen year old son, Christopher. His wife is a member of the ballet of the Hamburg Staatsoper, under a contract which expires in September, 1981. His son is enrolled in the 10th grade in the International School of Hamburg.

Respondent was issued a United States passport on March 30, 1978, with an ex-

piration date of March 29, 1983. He has used that passport extensively, both for personal travel with his family (to which the government has no objection), and for travel which the government opposes. On December 23, 1979, he was handed a letter by the United States Consul-General in Hamburg, notifying him that his passport was revoked in its entirety. The letter invoked the purported authority of C.F.R. §§51.70(b)(4) and 51.71, and asserted that:

> The Department's action is predicated upon a determination made by the Secretary under the provisions of Section 51.70(b)(4) that your activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States. The reasons for the Secretary's determination are, in summary, as follows: Since the early 1970's it has been your stated intention to conduct a continuous campaign to disrupt the intelligence operations of the United States. In carrying out that campaign you have traveled in various countries (including among others, Mexico, the

> United Kingdom, Denmark, Jamaica, Cuba, and Germany), and your activities in those countries have caused serious damage to the national security and foreign policy of the United States. Your stated intention to continue such activities threatens additional damage of the same kind. (A. 13).

Thus, contrary to the implications of the petition, and the government's repeated references to Snepp v. United States, No. 78-1871 (Feb. 19, 1980), see Pet. 2-3, respondent's passport was not revoked on some ground peculiar to former CIA agents, but rather on a ground which would, if upheld, authorize revocation of any person's passport if its conditions were met. The government has not attempted to rely on any agreement between respondent and the Central Intelligence Agency to justify the revocation, either initially, App. G infra, at 120a, or before the courts below

or this court. [3/] The agreement between respondent and the CIA does not purport to encumber respondent's right to travel.

3. On December 31, 1979, respondent filed suit to challenge the revocation of his passport, asserting five grounds:

1) that 22 C.F.R. §§51.70(b)(4) and 51.71 were not authorized by Congress;

2) that 22 C.F.R. §51.70(b)(4) and 51.71 were vague and overbroad;

3) that summary revocation prior to any notice or informal hearing violated procedural due process;

3/Accordingly, reliance on such a theory would be unavailing here. SEC v. Chenery Corp., 332 U.S. 194, 196 (1974). Judge Robb similarly disposed of the government's belated, and half-hearted, reliance on 22 U.S.C. §1732. See Pet. App. 9a.

4) that revocation violated respondent's right to travel protected by the Fifth Amendment; and

5) that the passport was revoked to punish respondent for exercising his First Amendment rights, and to suppress his criticism of official government policy.

To draw the statutory authorization question immediately and squarely before the Court, relying on Aptheker v. Secretary of State, 378 U.S. at 516-517, respondent agreed not to contest the Secretary's allegations, although he carefully insisted that the factual truth of the charges was not thereby admitted. Ct. App. 15-18, 29, 32, 46. On cross motions for summary judgment, Judge Gerhard Gesell declared 22 C.F.R. §51.70(b)(4) invalid and ordered the Secretary to restore

respondent's passport. Pet. App. 99a.[4/] He held that the Congress had not expressly authorized the executive to revoke passports on national security grounds, and that the Secretary had not established implicit authorization from a "sufficiently substantial and consistent administrative practice to warrant the implied approval of Congress". Pet. App. 95a, quoting Zemel v. Rusk, 381 U.S. 1, 12 (1965).

4. On appeal, the Court of Appeals affirmed. Writing for himself and Judge Wald, Judge Robb followed the path prior

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4/Because the case presented "a pure question of law" Judge Gesell did not require futile exhaustion of administrative remedies. Contrary to petitioner's assertion, respondent did not waive his right to an administrative hearing if his facial challenge to the regulations was rejected. Ct. App. 45-46.

decisions of this Court had carefully laid out. He canvassed, as had Judge Gesell, the government's impoverished collection of claims of regulatory authority and the single instance of its imposition, and easily concluded that the Secretary's showing was "inapposite and unpersuasive". The Court also found significant the repeated refusal of Congress to enact legislation requested by the Secretary of State to authorize passport denials for persons whose activities would "seriously impair the conduct of the foreign relations of the United States" or would damage the national security. Pet. App. 12a n.4.

Judge MacKinnon dissented, measuring the reach of the Congressional delegation of passport revocation authority by his

personal distaste for respondent's activities.[5/]

REASONS FOR DENYING THE PETITION

None of the reasons set forth in this Court's Rule 17 suggest that the writ should be granted. Judge Robb's careful decision below, in which he affirmed identical conclusions reached by the able district court, presents no conflict with decisions of other courts. Far from conflicting with decisions of this Court, it in fact faithfully follows more than twenty two years of right to travel jurisprudence. Reversal of the decision below would effectively reverse both Kent v. Dulles, 357 U.S. 116

5/The personal nature of Judge MacKinnon's dissent is reflected in his injudicious proposal of draft indictments, all of which depend on "facts" reported by the New York Post that Mr. Agee has denied, and that are untrue. The government does not contend otherwise. See Pet. 20 n.17.

(1958) and Dayton v. Dulles, 357 U.S. 144 (1958). The issue presented is in Justice Frankfurter's words, "too moribund for adjudication." Darr v. Burford, 339 U.S. 200, 227 (1949)(dissenting opinion).

Largely because the question presented by the Secretary has for all practical purposes been answered by this Court in Kent v. Dulles, Aptheker v. Secretary of State and Zemel v. Rusk (and by Congress as well), it is not in any meaningful sense important. The ground rules regarding passport revocations are carefully set forth in this Court's cases. Congress has occupied the field, see Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-640 (1953) (Jackson, J., concurring) and the political branches of government are aware of the conditions under which passports may be revoked, and of the legislative steps necessary to broaden the scope for executive revocation.

To be sure, the executive has from time to time chafed under the regime of Kent v. Dulles, but Congress has repeatedly declined to expand the executive's revocation authority, after lengthy debates in which the protection of the constitutionally guaranteed right to travel was always a major concern.

Finally, the note sounded by the dissent and repeatedly echoed throughout the petition, "No United States Congress would ever intend to require a President to issue a passport to one with Agee's record and intentions", (Pet. App. 17a; Pet. 2-5, 18-20) is not responsive to the legal question presented in the complaint, which was whether the revocation regulations were authorized by Congress.

The Court's summary disposition in Snepp v. United States No. 78-1871 (Feb. 19, 1980), and its new Rule 23.1 necessitate a somewhat fuller treatment of the issues than

we would ordinarily undertake in opposition to certiorari.

1. The judgment below does not conflict with this Court's prior passport decisions, but instead faithfully follows them. Briefly stated, the cases hold that wherever the passport power rested prior to 1926, Congress having since legislated on the subject, it is now a Congressional power. Accordingly, if the liberty of international travel is to be regulated, "it must be pursuant to the law-making functions of the Congress." Kent v. Dulles, 357 U.S. 116, 129. Compare Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-589 (opinion for the Court by Mr. Justice Black); id. at 637-655 (concurring opinion by Mr. Justice Jackson). Delegations of that authority by Congress will be narrowly continued. Kent v. Dulles, 357 U.S. at 129. To justify a regulation

authorizing revocation, the executive must show longstanding administrative practice sufficiently substantial and consistent to warrant a conclusion of implicit Congressional approval, since only the clearest evidence will allow Congressional silence to be a substitute for explicit and affirmative Congressional action. Id.; Zemel v. Rusk, 381 U.S. 1, 12 (1965). Finally, to prevent the exercise of First Amendment rights from serving as the real basis for limitations on the right to travel, Kent, 357 U.S. at 129-130; Zemel, 381 U.S. at 16, the Court will be particularly hesitant to assume that Congress authorized revocations based on "the character of the particular applicant", Zemel at 13.

Although the government has not attempted to rely on any inherent execu-

tive power to justify the revocation in this case regardless of Congressional actions, see Pet. App. 13a, it boldly asserts an excessively broad interpretation of 22 U.S.C. §211a which, together with the executive's broad powers and responsibilities in the fields of foreign affairs and national security, are said to support the challenged regulations. Pet. 13. But the Court has not read §211a broadly, and indeed rejected precisely that argument in Kent v. Dulles. Moreover, in a companion case to Kent, this Court held passport denial unauthorized even where the Secretary had explicitly determined that the intended travel "would be contrary to the national interest", and where the government defended the regulation challenged as necessary "to prevent the departure...of citizens when such departure...is reasonably likely to be inimical to the national safety in times of

peril". Dayton v. Dulles, 357 U.S. 144 (1958).[6] A decision for the Secretary here would require overruling Kent and Dayton, and for all practical purposes, Youngstown Sheet & Tube Co. v. Sawyer, supra, as well.[7]

6/Brief for Respondent, Dayton v. Dulles, 357 U.S. 144 (1958). The State Department statistics provided to the Senate Foreign Relations Committee during hearings in 1957 classified passport refusals under the regulation held invalid in Kent and Dayton as "passport refusals for security reasons." Pet. App. 14a n.7.

7/In Youngstown, as here, the executive claimed a need to abridge constitutional rights because of the necessities of the conduct of foreign policy (and, there, the Korean War). The Court recognized the necessity, but rejected the argument, holding that Congress, not the President, is entrusted with the law-making power. There, as here, Congress had explicitly rejected legislation which would have expressly authorized the action the President sought to take.

For the highlights of the legislative history of Congressional refusal to authorize passport revocations, see, in addition to

(footnote cont'd on next page)

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the majority opinion below, Pet. App. A, at 12a n.4, Hearings on Denial of Passports to Persons Knowingly Engaged in Activities Intended to Further the International Communist Movement Before the House Committee on Foreign Affairs, 85th Cong., 2nd Session, at 7-8 (1958)(State Department Legal Adviser's post-Kent concession that executive lacked national security revocation power); Hearings on Passport Legislation Before the Senate Foreign Relations Committee, 85th Cong., 2nd Sess., reprinted in Hearings Before the Senate Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 85th Cong., 1st Sess., at 377-380 (1957)(Under Secretary of State Robert Murphy's concession that the Secretary had "no right and no ground" to deny passports to Communists who, under 60 U.S.C. §781(8) and (15), posed harm to national security); Hearings on Passport Legislation Before the Senate Committee on Foreign Relations, 86th Cong., 1st Sess., 29-31 (1959)(comparison of pending bills and explicit recognition that current law did not authorize national security denials or revocations); Hearings on Proposed Travel Controls Before the Senate Subcommittee to Investigate the Administration of the Internal Security Act, 89th Cong., 2nd Sess., 72-73 (1966)(concession by then Acting Administrator of Bureau of Security Consular Affairs, State Department, Philip Heyman, that Congress had not authorized national security revocations). See generally, T. Ehrlich, Passports, 19 Stan. L. Rev. 129, 141 n.59 (1966).

2. The legislative history provides the government no more support than this Court's cases. In 1918, the Chairman of the House Committee on Foreign Affairs who sponsored the 1918 passport legislation pointed out that the Secretary of State was not then authorized to revoke passports on national security grounds, urged that such authority be granted because of the grave and immediate danger of wartime espionage, and stated that the discretion the Act provided would expire when the war was over. 56 Cong. Rec. 6066-6067 (1918)(remarks of Rep. Flood).[8/] The 1926 Congress must be presumed to have legislated in light of the understanding of the limited power granted in 1918, and

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8/He also specifically noted that the national security revocation authority claimed at that time was contrary to law, and could not be upheld. 56 Cong. Rec. 6066-6067 (1918).

this Court has so presumed, holding as a general rule that passport regulations enacted during the wartime measures of 1918 and 1941 are not relevant to the construction of a peacetime statute. Kent, 357 U.S. at 128.

Both Courts below quickly disposed of the government's surprising reliance on the 1978 revision of 22 U.S.C. §211a. The contraction of power to impose broad area control restriction hardly "support[s] the Secretary's construction of 22 U.S.C. §211a as a broad delegation of authority to regulate", Pet. App. 12a, particularly where the legislative history demonstrates that the 1978 revision was designed to implement the Helsinki Accords by reducing barriers to safe and easy travel between countries. See, e.g., 124 Cong. Rec. 4689-4690 (daily ed. May 31, 1978)(remarks of Chairman of the House Judiciary Sub-committee on Immigration, Citizenship,

and International Law, Joshua Eilberg, sponsor of the bill in the House)[9/]

3. The conclusion of the two courts below that the administrative practice was far too meager to warrant a conclusion of implicit Congressional authorization was fully

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9/The Secretary's reliance on such cases as Saxbe v. Bustos, 419 U.S. 65, 74 (1974) and United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979), see Pet. at 16 n.14, is misplaced. In the passport field this Court held more than twenty years ago that Congressional delegation of authority to revoke passports would be narrowly construed, and Congress has presumably legislated accordingly. Unlike the cases relied upon by the Secretary, the presumption here is that mere claims of authority without widespread, publicized practice will not be deemed approved by Congress. Kent, 357 U.S. at 129.

supported by the historical record, and the Court should not grant certiorari simply to repeat that extensive review. The substantial and publicized practice of area restrictions affecting thousands of Americans over 100 years canvassed by the Court and found sufficient in Zemel offered a far firmer basis for a conclusion of implicit authorization than the few scattered examples marshalled by the Secretary below.[10/]

10/Of the six examples cited by Judge Robb, Pet. 13a n.7, the two prior to 1926 had been specifically recognized by the sponsor of the 1918 legislation to be "beyond the law". 56 Cong. Rec. 6066-67 (remarks of Rep. Flood). The two instances in 1955, never upheld by any court, appear on their facts to be based not on national security considerations but on attempts to render allies favors by removing American "trouble-makers" from their countries. They are thus irrelevant to the authority claimed in this case.

As we have shown, the executive's consistent view of Kent as involving "national security" considerations contradicts its attempt to distinguish Kent as a case concerned solely with "beliefs or associations". The strenuous efforts to gain approval for national security revocation authority from 1958-1966, canvassed briefly, supra,[11/] coupled with repeated high-level warnings that there was "no ground" on which to revoke the passports of Communists travelling to Russia at the height of the Cold War, persuasively suggest that the executive should repair to Congress, and not this Court, for authorization of the revoca-

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11/ See also Brief for Respondent below, at 17-32.

tion power it so plainly lacks under current law. 12/

12/We note only briefly, to preserve the points should certiorari be granted, that the revocation here, even if authorized, violated rights guaranteed by the First and Fifth Amendments. Aptheker v. Secretary of State, 378 U.S. 500, 515-517, establishes both the regulation's overbreadth and respondent's standing to argue the question. Here, as in Aptheker, his actions are irrelevant to question of overbreadth. Id. See Plaintiff's Statement of Genuine Issues, Ct. App. 46. Even on the government's own arguments, a far more limited restriction of the passport to particular countries or for particular purposes would accomplish its goals. See Aptheker, 378 U.S. at 511-512. Far from casting doubt on the availability of a First Amendment challenge in circumstances such as these, Zemel v. Rusk specifically preserves a First Amendment challenge for cases where "the refusal to validate [a] passport...result[s] from...expression and association", 381 U.S. at 16, and forbids putting respondent to a choice between his First Amendment activity and his travel. Id. Finally, even assuming that the promised full hearing could follow summary revocation, at least notice and an informal opportunity be heard were required prior to summary revocation under the circumstances. See, e.g., Mackey v. Montrym, 443 U.S. 1, 11-12 (1979); Mathews v. Eldridge, 424 U.S. 319, 338 (1976); Goss v. Lopez, 419 U.S. 565 (1975).

4. As the ad hominem approach of the government indicates, this case represents what the government takes to be a golden opportunity to gain this Court's approval of a regulation that lacks the necessary Congressional sanction. Congress is presently considering legislation that might apply to some of the activities complained of, and it will be time enough to consider the constitutional questions that would be raised if that legislation is enacted. But the Court should decline even to consider the Secretary's argument that he may summarily and drastically curtail respondent's liberty on tenuous "national security" grounds simply because he sees an "unacceptable risk" in instituting the criminal proceedings which would concededly justify revocation of respondent's passport under Kent.

The more unpopular the individual

whose rights the government seeks to abridge, the more important are the procedural safeguards of the criminal law, permitting full testing of the government's "evidence" and an opportunity for public vindication. Our institutions, and the firm principle that Congress, not the Executive, has the power to legislate the conditions permitting abridgement of liberty in time of emergency, may be destined to pass away. "But it is the duty of the Court to be last, not first, to give them up." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 655 (Jackson, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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